when sued for rent due him has been put on the grounds of failure of consideration due to the acts of the landlord. But this defense to the performance of a contract can not operate when the tenant himself sues. This right has been given by some courts on the theory of an implied agreement of the landlord not to interfere with the performance by the tenant. *McDowell* v. *Hyman*, 117 Cal. 67; 29 HARV. L. REV. 555; contra, *Malzy* v. *Eichholz*, [1916], L. R., 2 K. B. Div. 308. The acceptance of this view would remove the last obstacle to the tenant's right to recover in this case.

MALICIOUS PROSECUTION—JUDICIAL PROCEEDINGS TO TEST SANITY.—Under a statute authorizing a proceeding before a justice of the peace to determine whether a resident alleged to be insane was a proper subject for treatment and entitled to be maintained at the state hospital the defendant maliciously commenced action against the plaintiff. In defence to an action for malicious prosecution the defendant claimed the action to have been extra-judicial. *Held*, that the proceeding was judicial and adequate to support the action. *Treloar* v. *Harris*, (Ind., 1917), 117 N. E. 975.

The initial requirement that in order to show a good cause of action for malicious prosecution a criminal proceeding must have been instituted by the defendant has been so far cut down that some courts, as the above, will allow recovery where any judicial proceeding has been commenced. There is, however, considerable variance on this matter. It is well settled in England and America that the action will lie where criminal proceedings have been set on foot. *Elsee* v. *Smith*, 2 Chit., 304; *Dennis* v. *Ryan*, 65 N. Y. 385; *Sweet* v. *Negus*, 30 Mich. 406; also, where the suit is a civil one and involves arrest of person or attachment of property, *Harr* v. *Ward*, 73 Ark. 437; *Tomlinson and Sperry* v. *Warner*, 9 Ohio 104; *Smith* v. *Cattel*, 2 Wils. K. B. 376; or where the action results in special damage to business or reputation, viz.: proceedings to wind up a trading company, *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre*, 11 Q. B. Div. 674—proceedings to declare one a bankrupt, *Chapman* v. *Pickersgill*, C. P. 2 Wils. 145; *Wilkinson* v. *Goodfellow-Brooks Shoe Co. et. al*, 141 Fed. 218—inquisition of lunacy, *Dordoni* v. *Smith*, 82 N. J. L. 525. Many courts in this country allow the action for the institution of any civil judicial proceeding, *Closson* v. *Staples*, 42 Vt. 209; *Kolka* v. *Jones*, 6 N. D. 461. The leaning seems to be in this direction, NEWELL ON MALICIOUS PROSECUTION, 32; 1 COOLEY ON TORTS, (3rd Ed.) 350. Indiana adheres to the latter view, *Coffey* v. *Myers*, 84 Ind. 105; *McCardle* v. *McGinley*, 86 Ind. 538. Even though the principal case involves a non-criminal proceeding without arrest or attachment of property it would be in accordance with the doctrine of the Indiana courts since there is the added feature of special damage to reputation, *Lockenour* v. *Sides*, 57 Ind. 360. However, the case has one peculiarity in that the judicial proceeding does not purport to adjudicate or conclude the mental status of the person alleged to be insane, but merely declares that the person as fit to be admitted to one of the hospitals, which is the only purpose for which the statute was enacted, *Naanes* v. *State*, 143 Ind. 299. The same case arose in California

under a very similar statute where the recovery was allowed even after the plaintiff had been a resident at the asylum, *Kellog* v. *Cochran,* 87 Cal. 192. These cases involving a statutory proceeding, though very rare, raise an interesting inquiry—from an entirely different angle—into the requisite nature of the judicial proceeding. While the opinions have said nothing about the ultimate nature of the judicial proceedings as regards the contested rights of the party maliciously sued, yet it is evident from an examination of the cases that the purpose of the suit in every instance was to impair some valuable right enjoyed by the defendant; rights *in rem* were always involved. In the principal case, no right which the plaintiff desired to preserve was at stake in the malicious suit: the right to reside in the asylum was, no doubt, far from his desire; nor does the statute authorize a finding by the justice of the peace to force his residence there. It is clear that the plaintiff could not prevail if the proceedings instituted were extra-judicial, *Turpin* v. *Remy,* 3 Blackf. 210. To keep the case within the rule, therefore, the court lays down a broad definition of judicial proceeding: a proceeding by a regularly constituted court of justice clothed with authority to hear and determine a question of fact, or a mixed question of law and fact, upon evidence written or oral, to be produced before such court, and thereupon to enter a decision affecting the material rights or interests of one or more persons or bodies corporate. The court goes on the ground that the gravamen of the action for malicious prosecution is the fact that the plaintiff "has been improperly made the subject of legal process to his damage." It would seem that the holding of the court works best to prevent the use of the judicial machinery for malicious purposes, which is, after all, the real reason for allowing the action.

NEGLIGENCE — LICENSEE OR INVITEE — PERSON ACCOMPANYING PURCHASER INTO STORE.—Two boys entered a grocery store, only one of whom intended to purchase. As a clerk opened a case of goods the other, (the plaintiff), was blinded in one eye by a flying piece of metal. He brought an action and was nonsuited in the trial court. *Held,* nonsuit proper; the plaintiff was a mere licensee, not an invitee, and only entitled to protection against willful injury. *Fleckenstein* v. *Great Atlantic and Pacific Tea Co.,* (N. J., 1917), 102 Atl. 700.

The fundamental difference between a licensee and invitee is the purpose with which one is on the other's premises. In the words of KNOWLTON, J., "* * * to come under an implied invitation as distinguished from a mere licensee, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant." *Plummer* v. *Dill,* 156 Mass. 426. In that case the plaintiff went on defendant's premises in search of a servant and was held to be only a licensee. See also *Indermaur* v. *Dames,* 14 L. T. R. (N. S.) 484. A woman, who because she was of the same race and religion as a dead man, came to the house he had occupied